

EARTHQUAKE HAZARDS AND LOCAL GOVERNMENT LIABILITY

EXECUTIVE SUMMARY

By Terry Margerum

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At the request of member governments the Association of Bay Area Governments (ABAG), using funds from the National Science Foundation, spent much of 1978 examining the potential liability of local governments for earthquake losses. In addition to a thorough legal analysis, ABAG staff conducted lengthy interviews with local officials at sites of recent earthquakes — Anchorage, Seattle, Santa Rosa, Los Angeles, San Fernando, and Oroville. Finally, local officials in 88 jurisdictions in California, Alaska, Utah and Washington were surveyed regarding their attitudes toward earthquake hazards and tort liability law.

The purpose of the study was

- 1 — To clarify the nature and extent of local government's potential liability;
- 2 — To advise local government how to cope with that liability;
- 3 — To recommend ways tort law could be changed to encourage local governments to reduce earthquake hazards without increasing their liability.

This report summarizes the study's major findings and recommendations.

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The Basic Question

Could a local government be held liable for injuries or losses in an earthquake which are caused (or made likely) by its failure to eliminate a known hazard? For example, if people are injured when an old county hospital collapses in an earthquake, should the county be held liable if the injured parties proved the county knew that the old hospital would be unsafe in a foreseeable earthquake and did nothing to reduce the danger?

Not so long ago such questions were never asked. Earthquakes and their effects were considered "acts of God," and governments were protected by so-called "sovereign immunity," a legal doctrine inherited from the English Common Law. Things have changed, and it is now quite possible that a local government could be liable in the situation described above.

Why Liability for Earthquake Hazards is a Potential Problem

Several factors make it possible that a local government would be held liable for injury, caused by its alleged failure to reduce earthquake hazards.

Legal Facts of Life

- Liability claims are increasing in frequency and visibility, especially against government. A task force of *California's Commission on Government Reform* pointed out that of all the ways government has grown in recent years, none has been more rapid than its growth as a target for claims and lawsuits. Anxious plaintiffs rush to court at the slightest provocation. The *California Citizens' Commission on Tort Reform* found that the number of non-auto tort claims filed is growing 7-15 times as fast as the State's population.
- In recent decades there has been a trend toward making government more liable and less immune. This is evident in both legislative and judicial decisions.
- Increasingly the courts are shifting private losses to the public by going for government's so-called "deep pocket" even where government involvement in the injury was passive and minimal.

The Disappearing "Act of God"

An increasing number of courts are holding governmental bodies financially responsible for damages suffered by private individuals in natural disasters. These decisions reflect a growing willingness of the courts to disregard the time-honored agreement that injuries resulting from natural disasters are unavoidable (and liability-free) "acts of God." This change in judicial attitude probably results from several technological changes which reduce the credibility of the "act of God" defense. Thus while the earthquake itself remains an act of God, its effects on people and structures are foreseeable — for several reasons:

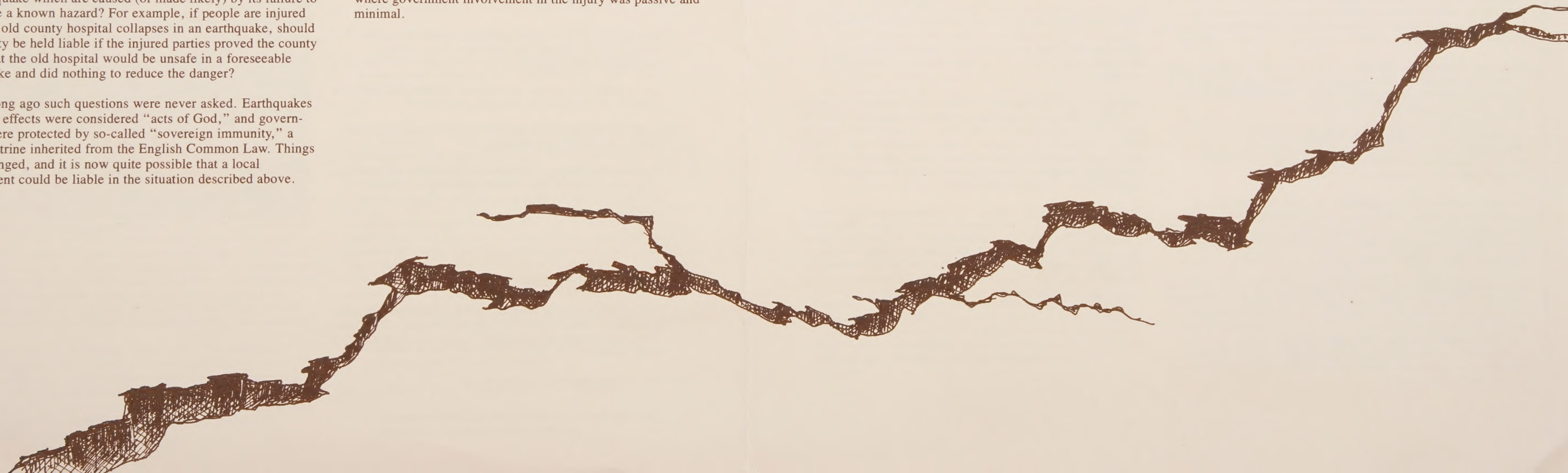
- **we know how to build** Advances in structural engineering and construction techniques have made it possible to design new structures to be relatively earthquake-resistant, and to modify old buildings so that they don't pose serious hazards to life.
- **we know where not to build** Improved geological information often makes it possible to avoid hazardous areas, e.g., fault zones, landslide areas, poor soil conditions, etc.
- **earthquake prediction** Before the end of the century this developing science may provide practical warnings of impending quakes.

Public Awareness and Expectations

Both the media and the public are becoming more aware of government's role in reducing the consequences of natural disasters — and expecting government to fulfill that role responsibly. For example, in the 1978 mudslides in Southern California, people asked why the government had allowed developers to build and sell homes in such potentially hazardous areas, places with a clear history of landsliding. As Los Angeles County Supervisor Baxter Ward put it: "The residents of the county are appalled that permits are issued on hillside properties that are unsafe (in severe rainstorms). The public thinks, justifiably or not, that there is some implied guarantee that government knows what it is doing."

Inherent Vulnerability of Local Governments

In addition to these trends, there is the constant fact that cities and counties are inherently vulnerable to liability because of the many services they provide. They adopt and enforce building codes, land use and zoning ordinances; they prepare disaster and emergency plans; they build and maintain numerous facilities of their own; and they are responsible for keeping public areas — parks, sidewalks, streets, etc. — free and clear of hazards. Local government can shirk neither these duties nor the potential liability which accompanies them.



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To Clarify

the nature and extent of local government's potential liability

A thorough review of statutory law and relevant cases in California and several other states indicates numerous sources of potential liability for failure to reduce known or suspected earthquake hazards. The research indicates that carefully conceived hazard reduction programs will reduce not only hazards, but potential liability as well. It is also clear that, independent of what a jurisdiction is doing (or not doing) to reduce hazards, there are legal and administrative strategies for minimizing potential liability.

Local government liability for failure to reduce earthquake hazards is most likely to occur for one (or both) of the following reasons:

- 1 — Ignorance or misunderstanding of tort law;
- 2 — Failure to do what is legally required or "reasonable" in specific situations

Understanding the Law

Inadequate understanding of certain key legal principles increases the chances of liability.

Reasonableness "Reasonableness" is determined from the circumstances such as the foreseeability of the injury, the apparent magnitude of the risk, and the relative costs and benefits of action vs. inaction. Of course the reasonableness of a local government's behavior is determined after the fact. In the earthquake context this may be after people have been injured or killed.

Statutory or mandatory duties Under present law, failure to comply with duties imposed by state or federal government constitutes a strong argument for liability. These duties vary by state, but generally those most relevant to earthquake hazards relate to:

- building codes and standards
- inspection, certification and permit requirements
- environmental hazards and land use ordinances
- emergency and disaster planning requirements
- dam failure evacuation plans.

Duties created by local enactments It is probable (though not certain) that a local government can create mandatory duties binding upon itself which may be the basis for liability and, under recent court cases, nullify certain immunities related to issuance of permits or non-enforcement of laws.

Discretionary immunity Failure to understand and use this important immunity can result in unnecessary liability. "How" a decision is made can be as important as the decision itself. Discretionary immunity applies to "basic policy decisions" which have a "planning" rather than "operational" character. The higher the level of the decision-maker the more likely that the immunity applies. Generally technical, professional and scientific decisions do not qualify because they are not "policy" decisions.

Doing What's Required and Reasonable

The potential for local government liability is greatest in several specific situations, mostly relating to property owned by the jurisdiction.

Dangerous conditions of public property The most obvious and likely sources of liability are injuries or damages caused by the "dangerous condition" of local government's property. Many jurisdictions have public buildings in daily use which could be hazardous in a reasonably foreseeable earthquake — hospitals, city halls, jails, courthouses, etc.

Less obvious sources of liability than public buildings are public right-of-ways (e.g., streets, sidewalks) which could become hazardous in an earthquake due to parapets or cornices falling from private buildings. It is unclear whether the courts will hold local governments liable in such circumstances although several court decisions indicate they could.

Hazardous private property Local governments have much less potential liability for injuries on private property than on public property. If a local government discovers a hazard on private property it must inform the owner and follow through with any other explicit mandates of state or local law. Within these mandates local governments in some states could be liable for negligent building inspection or permit issuance, or failure to enforce codes and ordinances.

Earthquake prediction and warning Local governments could be held liable for injuries or damages caused by their action or inaction in responding to an earthquake prediction or warning. Upon receiving advance notice of an earthquake, a local government might have to make numerous decisions at various policy and operational levels. It is probable that some or all these decisions would be considered discretionary — but this is not certain.

A general observation Minor or moderate earthquakes are more likely to result in local government liability than great earthquakes for two reasons. One, they occur more frequently and therefore are more foreseeable. Two, they are more likely to cause extensive damage or injury **only** in buildings and locations that are obviously hazardous. In other words, the more blatant the hazard and the more moderate the earthquake, the higher will be the chances of liability.

To Advise

local government how to cope with that liability

- 1 — Familiarize policymakers and administrative officials with major principles of tort liability.
- 2 — Ascertain and fulfill statutory or mandatory duties imposed by higher levels of government.
- 3 — Use caution when enacting laws which may not be carried out. The creation of such “duties” can often be avoided by careful wording of enactments or by not passing them at all. With regard to wording and intent:
 - permissive rather than mandatory language should be used (“may,” not “shall”); in other words create a power, not an obligation;
 - ordinances should be worded so as to target protection of the general public rather than a specific limited group;
 - a disclaimer of liability in the local ordinance may be effective in the event of a later suit.
- 4 — Avoid non-legislative actions which create affirmative duties which cannot be met.
- 5 — Develop and implement strategies for maximizing discretionary immunity. This means that:
 - decisions about earthquake hazard reduction should be made at a high policy level (elected officials or top administrative staff).
 - decisions should be made with explicit recognition of the potential hazard.
 - decisions about earthquake hazards should be incorporated into the jurisdiction’s risk management program.

- 3 — Enforce the provisions of the Alquist-Priolo Special Studies Zones Act (California).

Make decisions about how to respond to an earthquake prediction or warning at the highest policy level, in order to maximize the applicability of the discretionary immunity.

Some additional ideas for minimizing liability and its impact:

- 1 — Self-insuring local governments which know or suspect significant earthquakes hazards within their jurisdiction, and feel they have insufficient resources for mitigating them, should re-examine the wisdom of self-insurance.
- 2 — Investigate pooling arrangements for liability insurance against earthquakes hazards. Ideally, a consortium would include jurisdictions with comparable seismic safety risks but which are geographically dispersed and thus unlikely to be hit by an earthquake at the same time.
- 3 — Establish a modern risk management system.

Public Property

- 1 — Within budgetary constraints, establish a regular inspection program to discover hazardous conditions on the local government’s own property.
- 2 — Once dangerous conditions are detected, establish and implement a plan for disclosing and/or mitigating the hazards.
- 3 — (California only) Become familiar with the “design immunity” and its recent court interpretations.
- 4 — Determine if public right-of-ways (e.g., sidewalks and streets) or other public properties are made dangerous by hazardous parapets, cornices, or other appendages on adjacent private structures.

Private Property

- 1 — Follow through on code violations and non-compliance revealed by inspection. This is especially important in states without a tort claims statute which gives immunity for negligent inspections and permit issuance.
- 2 — Enforce state-mandated building codes.



Photo courtesy of Ziony, U.S. Geological Survey.

To Recommend

ways current laws could be changed to encourage local governments to reduce earthquake hazards without increasing their liability

Problems With the Current Law

Uncertainty

In ABAG's survey of nearly 400 local officials in 88 jurisdictions and four states, 96% of the respondents felt that tort liability rules were extremely uncertain and unpredictable. The survey also asked their opinion about local government liability in five specific situations. The divergent responses to these hypothetical cases reinforced their general perception of great uncertainty.

Other studies have documented this problem too. A recent report by the National League of Cities contended that "there is a need to clarify the scope of municipal liability — cities cannot operate in an environment devoid of guidelines."

In its final report, the *California Citizens' Commission on Tort Reform* concluded that "the level of uncertainty about current tort rules is now very high, and it is rising . . ." and that this "new crisis of uncertainty could be much deeper and potentially more destructive than any in this century."

There are several causes of this uncertainty:

- 1 — lack of clarity in the law
- 2 — vagueness of certain tort concepts
- 3 — unfamiliarity with tort law concepts
- 4 — judicial lawmaking
- 5 — unpredictable juries

The net effect of this uncertainty is to reduce the impact of tort law on local government behavior. Clearly if local government does not understand the law or feels that the application of tort rules is unpredictable, then liability considerations will not be a significant factor in their decisions. Hence the accident prevention/safety promotion purposes of tort rules are frustrated.

Disincentives

There are disincentives to earthquake hazard reduction in the current law. The following three are most important:

- 1 — **actual notice or knowledge rules** One of the features of tort law generally, and the California statute in particular, is that it imposes certain obligations on government once it has "actual knowledge" of a hazardous situation. While it makes sense not to hold government liable for a hazard of which it is unaware, the unintended incentive of this rule is to discourage local governments from aggressively seeking information through regular inspection programs or surveys of hazardous buildings.
- 2 — **mandatory (or obligatory) duty rules** The content and language of local ordinances can be legally relevant in tort liability cases. Local enactments may impose obligatory duties, for which non-compliance could result in liability. This fact gives local governments a considerable incentive to avoid adopting such ordinances or to word them so as to avoid creating a mandatory duty.

- 3 — **affirmative duty/undertaking rules** If a jurisdiction voluntarily undertakes to provide a certain service, it may increase its potential liability if it performs that service negligently or — after having caused people to rely on the service — fails to perform at all.

Generally, our project's research confirmed the *Commission on Government Reform's* finding that "there is an increasing conservatism in the provision of many needed governmental services because of their liability potential."

All of these disincentives inhibit a major objective of tort law, namely to deter negligence, prevent accidents, and promote safety. Furthermore, as awareness of liability issues increases (which it will) the negative consequences of these disincentives will become greater.

To date, in most jurisdictions, the impact of the uncertainty and disincentives described here has been negligible because most jurisdictions are not yet aware of their potential liability for earthquake losses.

The Future

While potential liability has had little impact on past decisions about earthquake hazards, it will become more important in the future, for several reasons:

- **increased awareness of earthquake hazards** Several recent studies have revealed increasing public and media concern about earthquake dangers, and a desire by the public for more information.
- **increasing frequency and visibility of liability claims and suits**
- **trend in local government toward self-insurance and risk management** Both practices greatly increase awareness of liability considerations.

As potential liability for earthquake hazards becomes a more salient issue, the problems of uncertainty and disincentives will further distort and inhibit the purposes of the tort law. The net effect could be that laws designed to promote safety actually discourage local governments from serious efforts to reduce earthquake hazards.

The law should be providing clear guidance and incentives to eliminate hazardous conditions. It is not. Rather it is having less impact than it could because it is perceived by local governments as uncertain and unpredictable; and when it does influence their actions, that influence is often likely to discourage aggressive efforts to discover and eliminate hazards. Furthermore, these problems in the law will become exacerbated in the future as liability issues become more visible and important. Therefore it is important that efforts be made to correct these problems. The following policy recommendations to state governments are designed to:

- 1 — **reduce** the amount of **uncertainty** about the liability consequences of certain actions;
- 2 — **eliminate** safety **disincentives** in the current law;
- 3 — **encourage** reduction of earthquake hazards without **increasing** local government's liability.

Recommendations

to state governments

I—State legislation should be enacted which clarifies local government's potential liabilities arising from earthquakes, and reduces tort law disincentives to reduction of earthquake hazards. Major components of this legislation are described below.

A. Public Property

- 1 — The legislation would require the state, within one year, to notify local governments (general purpose and other local public entities) whether they are located wholly or partly in an area of significant seismic risk. Prior to such notification, local governments would be immune from liability for personal injuries, death or property damages caused in an earthquake due to dangerous conditions of public property. After such notification:
 - **local governments NOT in a seismically hazardous area** would retain this immunity;
 - **local governments which ARE in a seismically hazardous area** could retain this immunity if they met the following requirements:
 - a) Within one year inspect all their publicly-owned properties included in an area of seismic risk for the purpose of determining whether any of such properties pose a potential hazard to life or privately owned property as a result of an earthquake;
 - b) Within one year after completing the inspection of public properties, adopt a plan to mitigate the hazards identified in the inspection program. Specific mitigation measures and their timing would be established by the local governments; and
 - c) Thereafter, the local governments must be in reasonable compliance with their adopted mitigation plans.

A possible alternative to recommendation A-1, which merits further study, would be legislation requiring the state to establish voluntary earthquake liability insurance. This would be available to local governments at no cost if they met the types of hazard mitigation conditions outlined above.

- 2 — The legislation would provide that where a local government is held liable for injury or damage sustained in an earthquake due to a dangerous condition of public property caused by the condition of adjacent private property (e.g., a private parapet falling on a public sidewalk), the local government's **liability would be limited in direct proportion to its share of the negligence** causing the loss.

Note: In legal terms this would mean abandonment of the rule of joint and several liability among concurrent tortfeasors in favor of a rule of several liability as to local defendants in such cases.

B. Private Property

- 1 — To encourage the voluntary rehabilitation and improvement of older buildings, the legislation would provide that a local government may adopt an "earthquake life-safety standard" less rigorous than the currently applicable building code. Its purpose would be to reduce the chances of personal injury in such buildings, not to minimize property damage. A local government would have no liability for personal injuries, death or property damages sustained as a result of an earthquake in or because of such rehabilitated buildings by reason of the local government's adoption and enforcement of such earthquake life-safety standards.

- 2 — The legislation would provide that actual or constructive notice of a dangerous condition of private property cannot be a source of local government liability for injuries or loss caused by an earthquake unless:
 - a) the injury was caused by a failure of the local government to comply with a statutory of mandatory duty; or
 - b) the injury occurred on public property which was dangerous because of a known dangerous condition of private property (e.g., private parapet falling on public sidewalk).
- 3 — The legislation would provide that where a local government is held liable for injury or damage sustained in an earthquake on **private property**, the local government's **liability would be limited in direct proportion to its share of the negligence** in causing the loss.

Note: In legal terms this would mean abandonment of the rule of joint and several liability among concurrent tortfeasors in favor of a rule of several liability as to local government defendants in such cases.

C. Earthquake Prediction and Warning

- 1 — The legislation would provide that the state and its agencies would be immune from liability for personal injuries, death or property damages including injuries to commercial and business interests caused by the issuance or non-issuance of an earthquake warning or prediction; or any acts of omissions in the fact-gathering, evaluation and other activities leading up to issuance or non-issuance of such a warning or prediction.
- 2 — The legislation would make it clear that a "state of emergency" can be declared by authorized state or local officials based on a credible earthquake prediction or warning. Furthermore, such a declaration would provide state and local governments with the immunities provided in the California Emergency Services Act.

II—The State Attorney General should issue clarifying opinions on the following: (California only)

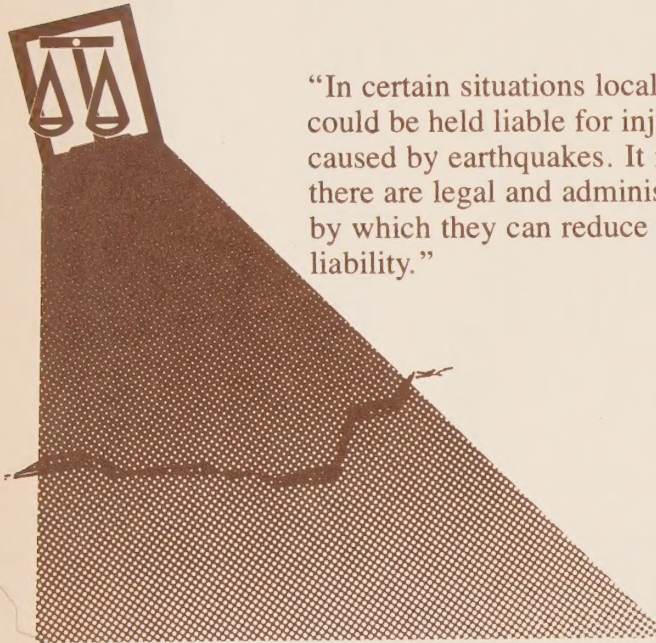
- A. Whether or not a local government's own enactments can impose mandatory duties upon the local government and/or other public entities located within its jurisdiction.
- B. Whether or not new information received by a public entity about earthquake hazards to public property can constitute "changed circumstances" within the rule of *Baldwin v. State* (6 C 3d 424; 99 Cal. Rptr. 145).

III—Appropriate state agencies should examine the feasibility of a long-term capital improvement program to reduce earthquake hazards in certain public structures and facilities. These would include high occupancy structures, lifelines, buildings occupied involuntarily or by partially dependent populations (e.g., schools, hospitals, jails, courthouses), and critical or emergency facilities.

Through matching grants, the state should provide 90% of the funding necessary to reduce the hazards.



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"In certain situations local governments could be held liable for injuries and damages caused by earthquakes. It is also clear that there are legal and administrative strategies by which they can reduce their potential liability."

Earthquake Liability Study

Project Advisory Committee

Robert Brown, Jr.
U.S. Geological Survey

Professor Winfred Carter, Member
Utah Seismic Safety Advisory Council

Henry Degenkolb, President
H. J. Degenkolb and Associates

Louise Giersch, Vice Chairman
California Seismic Safety Commission

John H. Larson, County Counsel
County of Los Angeles

James E. McCarty, President
American Public Works Association

Thomas K. McGuire
Deputy Attorney General
State of California

Professor Arnold Meltsner (Chairman)
Graduate School of Public Policy
University of California

Will H. Perry, Jr., Member
California Seismic Safety Commission

H. R. Pulley, Coordinator
Earthquake Programs
California Office of Emergency Services

Professor Arvo Van Alstyne
College of Law
University of Utah

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